

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 335 of 1981

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE K.M.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

MANUBHAI KHANDUBHAI NAIK

Versus

SUMANTRAI RANCHHODJI NAIK SINCE DECED.BY HIS HEIRS & L/R

Appearance:

1. First Appeal No. 335 of 1981
MR DD VYAS Sr. Advocate for the Appellant
MR BS PATEL, Advocate for the Respondents

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 18/09/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI FOR THE COURT)

#. This appeal is filed by the original plaintiff against the judgment and decree passed by the learned Civil Judge (Senior Division), Navsari on 6th August, 1980 in Special Civil Suit No. 113 of 1977, dismissing the suit in which the appellant had sought a declaration that the registered sale deeds dated 14th August, 1973 and 27th November, 1973 made in favour of the respondent-original defendant, were void ab initio, being without consideration and not intended to be acted upon, and seeking possession of the properties in question which were agricultural lands.

#. As per the averments made in the plaint, the appellant was the owner of the lands bearing survey nos. 358, 359, 389, 223, 349, 240 and 294, situated at village Manekpor of District:Navsari. The plaintiff had inherited the lands under a registered Will dated 22nd December, 1971, which was executed by his elder brother Nathubhai. The plaintiff had entrusted the management of these lands to the defendant who was "Sadhubhai" (husband of wife's sister) of the plaintiff's nephew Thakorbhai alias Paragji Kikabhai Nayak. According to the plaintiff, he had earlier executed a power of attorney in favour of the defendant to enable him to manage the lands and keep proper accounts in respect of the yield, because, the plaintiff had implicit faith in the defendant. In para-5 of the plaint, it was contended that in July, 1973, the defendant had written a letter to the plaintiff, stating that the government was likely to tighten the laws by imposing ceiling on the land holdings, and that it would be prudent if the said lands which stood in the plaintiff's name were transferred to the name of the defendant, without intending to transfer the ownership, under a sale deed. The defendant had suggested that, for this purpose, a power of attorney may be executed by the plaintiff in the name of Thakorbhai Gopalji Desai, who was maternal uncle of the two sisters who were the wives of the defendant and Thakorbhai alias Paragji Kikabhai Nayak. The defendant had forwarded a draft of the power of attorney to England where the plaintiff ordinarily resided, and because the plaintiff had implicit faith in the defendant, he followed his instructions and executed the power of attorney in terms of the draft which was sent to him by the defendant. The defendant thereafter got executed two sale deeds dated 14.8.'73 and 27.11.'73 in his favour through the said power of attorney holder Shri Thakorbhai Gopalji Desai. Thus, the sale deeds were executed in favour of the defendant because of the plaintiff's implicit trust in

him, and as per the advice and suggestion of the defendant that such a course was necessary to protect the land from the ceiling and other laws. According to the plaintiff, it was understood that the defendant was not to make any ownership claim on the basis of these documents which were nominally made and were sham and bogus, executed without consideration, and were not to be acted upon as per the prior understanding. It was further stated that both these documents were void, because, no amount towards the consideration as mentioned therein of Rs. 24,000/- or Rs. 7,000/- ever passed either in favour of the power of attorney-Thakorbhai Gopalji Desai or in favour of the plaintiff. According to the plaintiff, as per his information, financial condition of the defendant was so weak at that time that he could not have paid these amounts. It was further contended in para-5 of the plaint that, in reality, Thakorbhai Gopalji Desai was not authorised to sell or in any other manner transfer the lands in question to any one under the said power of attorney. On the contrary, there was a specific prohibition against effecting such transfer. Thus, the defendant did not acquire any right over these lands under the two sale deeds. However, the defendant filed a suit in the court of Civil Judge (Junior Division), bearing Civil Suit No. 61 of 1977, illegally asserting therein that he was the sole owner of the lands in question denying the ownership of the plaintiff and when the plaintiff came to know about such effort, he was constrained to file the present suit. In para-6, it was contended that the suit was being filed on the basis of title of the plaintiff for recovery of the property within 12 years, and due to the assertion of rights over the lands by the defendant by filing Civil Suit No. 61 of 1977 and, therefore, the suit was within limitation. In para-7 of the plaint, it was stated that the suit was valued at Rs. 1,08,000/- for the purpose of court fees and jurisdiction, further stating that the land in question was an agricultural land and the suit was valued for the purpose of jurisdiction and advocate's fees on the basis of the market value of the property which was Rs. 1.00 lac.

#. In the written statement exh. 29, the defendant asserted that he was the sole owner of the property in question in view of the two registered sale deeds executed in his favour in respect of these lands, and that he was in possession and occupation thereof. In para-4 of the written statement, he admitted that he was earlier managing the properties, but after the sale deeds, he had become the owner thereof. In para-5 of the written statement, it was denied that the defendant had

written a letter to the plaintiff, stating that nominal sale deed may be executed in view of the provisions of the Land Ceiling laws. It was stated that the plaintiff wanted to sell his lands, and therefore, the defendant showed a desire to purchase them and the plaintiff had executed the power of attorney in favour of Thakorbhai Gopalji Desai for the purpose of making the sale deeds. It was admitted that he was advising the plaintiff as regards the procedure for effecting such sale, but denied that consideration was not to pass in respect of these two transactions. He has stated that the amounts were paid in cash, as mentioned in the sale deeds, to the power of attorney holder of the plaintiff. The defendant denied the contention that no authority was given under the power of attorney by the plaintiff for the sale or transfer of the lands in question. According to the defendant, the plaintiff had instituted the suit at the instigation of other relatives. It was also contended that the suit was not maintainable, in view of the provisions of Section 31 of the Foreign Exchange Regulation Act, 1973, because, the plaintiff was having British nationality. It was further contended that the suit was barred by limitation.

#. The trial court framed issues at exh. 11, which are as under:-

[1] Does the plaintiff prove that sale deeds dated 14.8.73 and 27.11.73 executed by Thakorbhai Gopalji, the general power of attorney holder of plaintiff, in favour of defendant for suit lands were without any consideration, sham, nominal and to avoid technicalities of the Ceiling Act?

[2] Does the plaintiff prove that he had sent power of attorney on advice of defendant and had asked Thakorbhai Gopalji to execute sale deeds, but they were not to be acted and no ownership in reality were to be transferred to defendant?

[3] Does the plaintiff prove that the defendant was managing suit lands in absence of plaintiff as he was in foreign country?

[4] Whether the defendant proves that the suit is time barred?

[5] Whether the defendant is entitled to get declaration as prayed for?

[6] Whether the plaintiff is entitled to get vacant possession of suit lands from defendant?

[7] Whether the plaintiff is entitled to get accounts as prayed for?

[7A] Whether the defendant proves that the plaintiff is foreigner and not a citizen of India and therefore he is not entitled to hold property in India and, therefore, the suit is not maintainable?

[8] What reliefs or relief, if any, the plaintiff is entitled to get?

[9] What order and decree?

#. The trial court recorded composite reasons for issue nos. 1 to 7. It was held that the letters exhs. 79 and 80, which were written by the defendant to the plaintiff would go to show that the parties wanted to circumvent the provisions of the Gujarat Agricultural Lands Ceiling Act (1960) (hereinafter referred to as the "Ceiling Act") and thus, from all these facts, "it would be clear that Section 23 of the Indian Contract Act as well as pari delicto are amply attracted in our case". It was held:

"now if that is so, as the object or the consideration of the present agreements being unlawful, the said two sale deeds exhs. 60 and 61 are therefore void and court cannot lend its support to the plaintiff in order to achieve his said unlawful or illegal act or design. From all these facts, it would be clear that the suit lands in question be governed by Schedule I of the Gujarat Agricultural Lands Ceiling Act and the ceiling area in respect to the suit lands would come to about Acres 12-50 Gunthas or at the most, 15 Acres of land. As observed above, the total area of the suit land is about Acres 16-05 Gunthas of land, and thus, upon the facts on record, the provisions of the Gujarat Agricultural Lands Ceiling Act, 1960 are applicable to the facts of our case".

In para-14, the trial court held:

"Thus, the result is that in law also the above said two transactions are deemed to have been made in anticipation in order to defeat the object of the Act and hence fraudulent and the result is that the said two sale deeds exhs. 60 and 61 are thus hit by Section 23 of the Indian Contract Act, and equally the principle of pari delicto would apply to the facts of the present case."

In para-23 of the judgment, it was held that the suit of the plaintiff was not maintainable as it was hit by Section 23 of the Contract Act. While considering the question as to whether the sale deeds were without consideration, the trial court in para-31 of the judgment concluded that when sale deeds exhs. 60 and 61 were executed, it would be very difficult to accept the oral evidence and that in the two sale deeds it was specifically stated that the power of attorney holder Thakorbhai alias Paragji Kikabhai was paid the amount of consideration in cash. The Court held :

"In my opinion, the documentary evidence exhs. 60 and 61 should prevail over the oral testimony of the said plaintiff's witness no. 3 Thakorbhai Gopalji Desai ... The result would be that it cannot be said that the two sale deeds in question are without any consideration".

In para-32 of the judgment, it was concluded that it was not proved that the sale deeds exhs. 60 and 61 were not to be acted upon or that the defendant was not to get any right, title or interest in the lands. It was held:

"the defendant in conspiracy with the plaintiff had sent General power of attorney of the plaintiff's witness no. 3 Gopalji Thakorbhai for the execution thereof by the plaintiff, and that the plaintiff in fact, had executed a General power of attorney in favour of the plaintiff's witness no. 3 who has passed the sale deeds exhs. 60 and 61. It is also proved that exhs. 60 and 61 were executed in order to circumvent the above Ceiling Act, and under the circumstances, my answer to the above said issues is therefore, as shown above".

#. The learned Senior Counsel for the appellant argued that the facts clearly established that the appellant was the owner of lands in question and this was even admitted in the written statement in which the defendant had stated that prior to two sale deeds, he was managing the lands in question on behalf of the plaintiff, and that the plaintiff had executed power of attorney in favour of Thakorbhai Gopalji Desai, pursuant to which the two sale deeds exhs. 60 and 61 were executed in his favour. It was contended that the defendant has not led any evidence to establish his title. It was then argued that the power of attorney which was executed by the appellant in favour of Thakorbhai Gopalji did not authorise Thakorbhai Gopalji to execute any sale deed or transfer the land in any other manner. He submitted that in fact, under Clause-10 of the power of attorney, there was a specific prohibition against effecting any transfer of the land in question and this fact was also pleaded by the plaintiff in para-5 of the plaint. The learned Senior Counsel argued that, on the finding that the sale deeds were executed with a view to defeat the provisions of the Ceiling Act and were, therefore, void under Section 23 of the Indian Contract Act, the Court ought to have declared that the title in the land in question did not pass in favour of the defendant and that the plaintiff continued to be the owner of the property in question. It was then argued that the trial court has decided the matter without framing any issues on the question of fraud on the statute or in respect of Section 23 of the Act. It was contended that the principle of *in pari delicto* was not applicable in the instant case, because, the plaintiff had only acted as per the advice of the defendant who was managing the lands, and that mere execution of such sale deeds did not amount to defeating the provisions of the said Act. The learned Senior Counsel referred to the documentary evidence in the form of the letters which were addressed by the defendant to the plaintiff at the relevant time, pointing out that it was, in terms, admitted by the defendant in those letters that he had forwarded the draft of the power of attorney for getting the lands transferred in his name only as a matter of caution, and that no title was intended to be passed in his favour by the sale deeds executed on the advice of the defendant. It was submitted that the contents of the letters established that no consideration was to pass, because, no title was to be conveyed in favour of the defendant, and that it was only an arrangement to safeguard the lands against the provisions of the Ceiling Act, and the arrangement was only sham and not meant to be acted upon. That situation was quite

different from any fraud being committed with a view to defeat the provisions of the Act. It was submitted that the finding of the trial court that, consideration passed was based merely on the statements contained in the sale deeds, and the trial court did not properly appreciate several letters written by the defendant which clearly established that he never intended to purchase the land for any consideration and there was a mention in his letters that even after the nominal transfer of the lands to his name, they would continue to be the lands of the plaintiff and that the plaintiff need not worry about the lands, and further that the defendant was ready to give any writing in this regard if the plaintiff wanted him to execute such writing.

6.1 The learned Senior Counsel, in support of the contentions relied upon the decision of the Supreme Court in *Sita Ram vs. Radha Bai and others* [AIR 1968 SC 534], in which the Supreme Court in context of the provisions of Sections 23 and 24 of the Contract Act and the principle of "in pari delicto", held that, the principle that the courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim "in pari delicto potior est conditio defendentis" and the exceptions in which a man will be relieved of the consequences of an illegal contract into which he entered to which cases the maxim does not apply. They fall into three classes: [a] where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; [b] where the plaintiff is not in pari delicto with the defendant; [c] where the plaintiff does not have to rely on the illegality to make out his claim. It was held that in cases where the plaintiff must have been induced to enter into a contract by fraud or strong pressure, the parties are not in pari delicto, the less guilty party may be able to recover money paid or property transferred, under the contract. It was also held that the person who is under a fiduciary duty to the plaintiff will not be allowed to retain property or to refuse to account for moneys received, on the ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction.

6.2 The decision of the Supreme Court in *Jambu Rao Satappa v. Neminath Appayya* [AIR 1968 SC 1358] was cited to point out that in context of Section 23 of the Contract Act, the Court while considering whether knowledge of a party that purchaser will be in possession

of land in excess of ceiling under Section 5 of the Bombay Tenancy & Agricultural Lands Act, held in para-8 of the judgment that the Act contained no general restrictions upon such transfers and unless at the date of the acquisition, the transferee held the land in excess of the ceiling, the acquisition to the extent of the excess over the ceiling will not be invalid. It was held that the inability of the transferee to hold the land in excess of the ceiling prescribed by the statute has no effect upon the contract, or the operation of the transfer. The statutory forfeiture incurred in the event of the transferee coming to hold land in excess of the ceiling does not invalidate the transfer between the parties. It was held that contract for purchase of land entered into with the knowledge that the purchaser may hold land in excess of the ceiling is not void and enforcement thereof cannot be resisted on the ground that, if permitted, it will result in transgression of the law.

#. The learned counsel appearing for the respondent supported the decision of the trial court and contended that it was the plaintiff's own case that the defendant had induced him to execute sham sale deeds to save the land from the provisions of the Ceiling Act and the draft of the power of attorney was sent by the defendant to him which he executed in England and sent it to the defendant. It was pointed out that the original power of attorney was not produced and that from the power of attorney exh. 94, one page which might have included Clause-10 was missing. It is, therefore, not proved that under Clause-10 of the power of attorney exh. 94, the plaintiff had prohibited the transfer of the land in question or that the power of attorney did not have any power to convey the title of the lands in question by executing the sale deeds. It was then argued that there was no prayer made in the plaint for cancellation of the instruments under Section 31 of the Specific Relief Act and neither the plaintiff, nor his power of attorney holder Kantaben who had filed the suit had entered the witness box. The learned counsel also argued for the first time that the suit was barred by limitation and the provisions of the Benami Transactions (Prohibition) Act, 1988 were applicable to the transactions even though the Act came into force much after the execution of the sale deeds. It was further contended that though the letters written by the defendant exhs. 79, 80 etc. referred to the arrangement of transferring the land to the defendant to safeguard them from the provisions of the Act, the letter did not specifically state that no consideration

would pass from the defendant to the plaintiff. The learned counsel argued that two sale deeds were executed on different dates and if really no consideration was required to be paid, both would have been executed on the same day or in quick succession. He submitted that in these two registered sale deeds, it was clearly mentioned that the consideration was paid in cash to the power of attorney holder and, therefore, no oral evidence could have been admissible against such statement made in the documents. The learned counsel also argued that since the sale deeds were executed with a view to defeat the object of the Ceiling Act, the plaintiff was not entitled to recover possession of the land on the principle of "in pari delicto" even if the title did not pass by virtue of the provisions of Section 23 of the Contract Act. It was submitted that even if the consideration was not paid because of the documents being executed with a view to defeat the provisions of the Ceiling Act, and, therefore, being sham and bogus, the plaintiff would not be entitled to recover the possession of the lands in question. The learned counsel further argued that the appeal itself was not maintainable before this Court, because, for the purpose of court fees, the suit was valued only at Rs. 300/-, while the property was of the market value of Rs. 1.00 lac, as stated in para-7 of the plaint. He argued that since the valuation for the purpose of court fee was less, the appeal could have been filed only before the District Court.

#. In support of his contentions, the learned counsel for the defendant relied upon the following judgments.

[a] The decision of the Supreme Court in the case of Immani Appa Rao v. Gollapalli Ramalingamurthi [AIR 1962 SC 370] was cited for the proposition that where both the transferor and the transferee were in equal fraud in carrying out the transfer to defraud the creditors of the transferor and the fraud contemplated had been carried, but the possession remains with the transferor, in a suit by transferee for possession, it is open to the transferor to plead fraud and the absence of consideration. In such a case, there can be no question of estoppel for the obvious reason that a fraud in question was agreed to by both the parties and they had assisted each other in carrying out the fraud. When it is said that a person cannot plead his own fraud, it really means that he cannot be permitted to go to a

Court of Law to seek for its assistance and yet base his claim for the court's assistance on the ground of his fraud. If plea of fraud is upheld, the estate should be allowed to remain where it rests. In para-15 of the judgment, the Supreme Court held that the conveyance in favour of the transferee was not supported by any consideration and was the result of fraud; as such it conveyed no title to him, yet, if the plea of fraud is not allowed to be raised in defence, the court would in substance be giving effect to a document that is void ab initio. It was held that the High Court was in error in not giving effect to the finding recorded by the trial court that the fraud mutually agreed upon and contemplated by respondent nos. 1 and 2 had been effectively carried and that in the carrying out of the fraud, both the parties were equally guilty.

[b] The decision of the full Bench of the Bombay High Court in Guddappa Chikkappa Kurbar vs. Balaji Ramji Dange [AIR 1941 Bom. 274], which was approvingly referred to by the Supreme Court in Immani's case, in para-16 of the judgment, was cited for the proposition that where both parties are equally fraudulent, the courts will refuse to enforce the fraudulent transaction on the principles that where each party is equally in fault, the law favours him who is actually in possession, and will give relief to neither, and that a right of action cannot arise out of fraud, with the result that where the plaintiff seeks relief on allegation and on the basis of joint fraud, his suit will be dismissed.

[c] The decision of the Supreme Court in Ramti Devi v. Union of India [(1995) 1 SCC 198] was cited to point out that in a case where a sale deed was executed by the defendant to discharge pre-existing debts and got registered to the knowledge of the plaintiff, a suit for declaration that the plaintiff was the owner of the house and that the sale deed, having been executed to stifle the proposed prosecution of the defendant was void and not binding on the plaintiff, having been filed beyond three years from the date of execution/registration of the sale deed. It was held that the suit was time barred under Article 59 of the Limitation Act. That was a case where it was admitted in evidence, as noted in para-2 of the judgment,

that the plaintiff had knowledge of the execution and registration of the sale deed on 29.1.'47. Initially the suit was filed in 1959 but was dismissed as withdrawn with a liberty to file a fresh suit and the suit in question was filed on 30th July, 1966. The Supreme Court also held that the recitals in a document showed that the sale deed was executed for valuable consideration to discharge pre-existing debts and that apart from the prohibition, under Section 92 of the Evidence Act, to adduce oral evidence to contradict the terms of the recital therein, no issue in that behalf on the voidity of the sale deed or its binding nature was raised nor a finding recorded that the sale deed was void under Section 23 of the Contract Act.

[d] The decision of the Supreme Court in *Ranjit Singh v. Jaimal Singh* [2001 (10) SCC P.474] was cited to point out that the burden of proof where the plaintiff alleged that the holder of the power of attorney executed the sale deed in respect of the land in his favour before the death of the owner and as such the sale was not valid which fact was disputed by the defendant stating that the owner had died before the execution of the sale deed by the power of attorney holder, was on the plaintiff to establish that the power of attorney holder executed the sale deed when the owner was alive.

#. We may first deal with the contention that this appeal is not maintainable and it should have been filed before the District Court. Para-7 of the plaint clearly shows that for the purpose of jurisdiction and advocate fees, the value of the property was fixed at Rs. One Lac, being its market value. In the very first line of para-7, it is stated that for the purpose of court fees and jurisdiction, the suit was valued at Rs. 1,08,000/-. Since it was a suit for declaration, the relief in that regard was valued at Rs. 300/-. For the purpose of deciding whether the appeal lies or not to the High Court, the value for the purpose of jurisdiction would be material which was Rs. One Lac being the market value of the property, as mentioned in para-7. Obviously therefore, against the judgment and decree of the learned Civil Judge (Senior Division), an appeal would lie to the High Court in view of Section 26 of the Bombay Civil Courts Act, 1869, which provided that in all suits, decided by a Civil Judge, of which amount or value of the

subject matter exceeds Rs. 10,000/- (which later on was substituted by Rs. 20,000/-), the appeal from his decision shall be direct to the High Court. There is, therefore, no substance in the preliminary objection raised by the learned counsel for the respondents against the maintainability of the appeal before this Court.

##. It will be noted from the nature of the issues framed in the suit and the findings reached that the trial court has decided the question whether the sale deeds were executed with a view to defeat the provisions of the Ceiling Act, and, therefore, were void under Section 23 of the Indian Contract Act without there being any issue framed on that aspect. There are certain assumptions made by the trial court without examining the relevant provisions of the said Act and though no issue was framed on the aspect, which it has elaborately dealt with in the major part of the judgment. The issue no. 1 was only to the effect whether the sale deeds were without consideration, sham, nominal and to avoid technicalities of the Ceiling Act. The phrase "to avoid the technicalities of the Ceiling Act" was not sufficiently wide to put the parties to notice that a joint fraud was being alleged against the provisions of the Act.

10.1 It will be pertinent to note that under Section 7 of the said Act which places restrictions on transfer of sub-divisions of land, it was provided that notwithstanding anything contained in any law for the time being in force, no land shall, after the appointed day, be transferred whether by way of sale etc. or sub-divided, except with the permission in writing of the Collector. This would immediately show that the transfers should be made with the permission in writing of the Collector. Under sub-section (2) of Section 7, the Collector may refuse to give such permission if in his opinion, the transfer of sub-division of land was likely to defeat the object of the Act. It is also pertinent to note that nothing in this provision was applicable to a person who held the land not exceeding the ceiling area, as specifically mentioned in sub-section (4) of Section 7 of the Act. The consequence of transfers made in contravention of the provision is indicated in sub-section (3) of Section 7 as per which in computing the area of surplus land, if any, held by a person, such transfer was to be ignored. Furthermore, sub-section (2) of Section 8 enabled a person affected by the provisions of sub-section (1) of Section 8, to make an application to the Collector for a declaration that the transfer by partition was not made in anticipation in

order to defeat the provisions of the said Act. Section 15 provides that the extent of surplus land, if any, held by any person shall be computed on the basis of total land held by such person. Section 17 provides for the mode of determining in certain cases area of surplus land out of total land. Under Section 21, the Tribunal is empowered to make an order declaring the surplus land and consequences thereof. Section 47 specifically bars the jurisdiction of the Civil Court, inter alia, to decide or deal with any question which is by or under the Act required to be decided or dealt with by the Mamlatdar, Tribunal, Collector, the Gujarat Revenue Tribunal or the State Government. In short, there are various provisions in the Act which would have been relevant on the aspect as to whether such transfers, as were made in the present case, were illegal being contrary to the provisions of the Act on the ground that the excess land was being transferred and the question about the permission of the Collector would also have been relevant in that regard apart from the question whether Civil Court could at all have adjudicated upon the issue which fell within the jurisdiction of the Tribunal. In our opinion, the Trial Court has, therefore, delved on the question of transfers being against the provisions of the Ceiling Act at length, without there being any basis for such elaborate discussion for coming to a finding that the sale deeds were executed with a view to defeat the provisions of the said Act in the absence of any issue having been framed on that aspect. The finding that the sale deeds exhs. 60 and 61 were executed with a view to defeat the object of the said Act cannot, therefore, be sustained and it will be appropriate for the trial Court to frame the issue on that aspect and consider the matter afresh as will be directed hereinafter.

##. The question of consideration has been dealt with by the trial court in a cursory manner by merely relying upon the averments made in the sale deeds. The most material aspect of the matter was the letters which were written by the defendant and it is only after appreciating the documentary evidence, could the trial court have formed an opinion as to whether the consideration had really passed or not. Merely because the statements were made in the sale deeds, which obviously would be made, about the consideration having been paid in cash to the power of attorney holder, the trial court could not have shut its eyes towards the other relevant material which had a direct bearing on the question whether consideration in fact did pass. This was evident from proviso (1) to Section 92 of the Evidence Act, which, inter alia, laid down that any fact

may be proved which would invalidate any document such as want or failure of consideration. In *Roop Kumar v. Mohan Thedani* [(2003) 6 SCC 595], the Supreme Court, dealing with the provisions of Sections 91 and 92 of the Evidence Act, held in para-22 of the judgment that the bar under Section 92 arises only when the document is relied upon and its terms are sought to be varied and contradicted. It was held that the oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties. Thus, the contemporaneous record in the form of the letters written by the defendant, which had a direct bearing on the nature of the transaction that ensued, was important to appreciate the contentions raised in context of the validity of the sale deeds. To illustrate, the letter exh.80 written by the defendant shows that he had written in it that the power of attorney prepared by him, was being sent to the plaintiff, who should return the same at his address after executing it. It also mentions about the purchase of the stamp duty and fixing the value of the land for that purpose. In that letter, the defendant had also referred to the fact that Thakorbhai had suggested, when he was leaving, that the land be mutated in his name but at that time, he had refused, because, such laws were not anticipated. It was also stated that there should be no worry about the land, because, arrangement was being made only to save the land. It was then stated that it was a fact that the lands which were to be transferred by sale in the name of the defendant were being so transferred only because of the laws and to keep the lands secured so that if the addressee of the letter came to India, there would be no difficulty in managing the lands. It was also mentioned that if any writing was required to be executed by the defendant in this regard, that may be prepared and sent to the defendant who would sign and return it, and that the defendant attached more importance to their relationship rather than to land or money. It was also stated that the arrangement was to be made, because, there was no other way out. The addressee was told that when his children Rajan and Pravin become major, a writing would be prepared on legal advice that they had separated and the said land would be transferred to their names as per the understanding of the defendant. It was further stated that: "the land belongs to you and I am bound to do whatever you say". We are refraining from drawing any inference on the basis of this writing, but, we are only referring to it to illustrate that this and other letters which were written by the defendant were

material for deciding as to whether any consideration in fact passed or not as mentioned in the sale deeds, but, the trial Court has not referred to their contents for deciding whether the sole consideration in fact passed. Therefore, the finding of the trial Court on the question of consideration has been rendered without taking into account the relevant material and cannot be sustained, and the matter is required to be reconsidered by the trial Court in light of the entire evidence on record, including the further evidence that may be led on the issues we propose to frame, for deciding whether consideration in fact passed or not.

##. The fact that the trial court has not carefully examined the evidence on record is evident, even from its assumption regarding the nature of the power of attorney which is said to have been executed by the plaintiff in favour of Thakorbhai Gopalji Desai and a copy of which was got produced as per exh. 94 on the record of the case through talati of the village. According to the petitioner, the original power of attorney was sent to the defendant. However, the defendant has not produced the original power of attorney, denying the fact in the written statement that it was ever sent to him. It will be recalled that in his letter exh.80, the defendant had stated that the power of attorney be sent to him on his address. The original power of attorney is not forthcoming, otherwise, it would have thrown light on the important question as to whether the plaintiff had authorised under that power of attorney, the holder of the power Thakorbhai Gopalji to execute the sale deeds in favour of the defendant or to effect any other transfer of the lands in question. As noted above, it was specifically pleaded in para-5 of the plaint that there was no authority given under the power of attorney to Thakorbhai Gopalji to sell or transfer the lands in question, and that on the contrary, there was a specific prohibition against the transfer of the lands. This averment has been, in terms, denied by the defendant in the written statement as noted above. Thus, the parties were at variance about the nature of the power of attorney that was executed by the plaintiff in favour of Thakorbhai Gopalji, on the basis of which the defendant claims to have purchased the lands under the sale deeds exhs. 60 and 61. According to the plaintiff, under Clause-10 of the power of attorney it was made clear that no authority was given to its holder to sell or transfer the land. When we checked up the copy of the power of attorney at exh. 94, it transpired that out of seven pages of this copy, one paper (pages 5 and 6) was missing. That may have contained a part of the Clause-6

and Clauses-7 to 11. Therefore, if we read exh.94, which is a purported copy of the power of attorney executed by the plaintiff in favour of Thakorbhai Gopalji, we are unable to know what were the contents of Clause-10 which is sought to be relied upon. It is unfortunate that the trial court or the learned counsel who argued before it have not noticed this fact and even in the judgment, we do not find any reference to the contents of Clause-10 of the power of attorney or to the fact that one page is missing from exh.94 as pointed out by the learned counsel for the respondent. The trial court has, unfortunately, proceeded on an assumption in para-32 of the judgment, as noted above, that the power of attorney, in fact, contained an authority in favour of Thakorbhai Gopalji to execute the sale deeds exhs.60 and 61 in respect of the lands in question. Such an assumption was not warranted in view of the parties having been at variance on the aspect of the extent of power given to the holder for effecting sale or other transfer of the lands in question. The learned counsel for the appellant submitted that another copy of the power of attorney was produced with list of documents exh. 86 at sr. no. 2 and Clause-10 appeared in that copy in which it was stated that notwithstanding anything else to the contrary provided therein, the holder either jointly or severally, shall not be entitled to alienate, sell or otherwise dispose of any of the properties, whether movable or immovable, contingent or expectant. This copy exh. 86/2 was never proved in evidence and it would be a travesty of all the known canons of rules of evidence to read the said Clause-10 from the said copy exh.86/2 which was not proved in the copy of the power of attorney exh. 94 as was sought to be done by the learned counsel for the appellant. In fact, steps could have been taken to get the original power of attorney produced in evidence. In any event, the matter could not have been decided without framing an issue on the question as to whether, the plaintiff had authorised or not, under the power of attorney, the holder to sell or in any other manner transfer the lands in question. Therefore, on this material dispute, which arises from the averments made in the pleadings, an issue will have to be framed to enable the parties to lead evidence as to the nature of authority that passed to the holder under the power of attorney executed by the plaintiff, on the strength of which the defendant claims to have become the owner of the lands by virtue of the two sale deeds having been executed by the power of attorney holder.

##. The contention that the suit was only a declaratory one and that since it was a suit for cancellation of the

instruments under Section 31, it was not maintainable also could not have been raised by the learned counsel for the respondent in the absence of an issue before the trial court and a finding thereon. On the aspect of the limitation, the trial court has simply observed under issue no. 4 in para-33 of the judgment that the learned advocate for the defendant had not advanced any argument on the said issue, and that there was nothing on record to conclude that the suit was time barred, and answered the issue without giving any reasons for that finding. The trial court was required to consider the matter in light of the contention in the plaint that the suit was based on title and, therefore, could have been filed within 12 years. It was also required to consider as to which provision was applicable for deciding the question of limitation, under the provisions of the Limitation Act. No such exercise has been undertaken and the issue has been decided in a casual manner.

##. It will be seen from the above discussion that the following important issues which arise in the suit, were not framed by the trial court.

- [i] Does the defendant prove that the plaintiff is not entitled to any relief on the ground that the sale deeds were executed by him with a view to defeat the provisions of the Gujarat Agricultural Lands Ceiling Act, 1960?
- [ii] Does the plaintiff prove that the power of attorney executed by him in favour of Thakorbhai Gopalji did not authorise the power of attorney holder to transfer the lands in dispute?
- [iii] Does the plaintiff prove that the power of attorney executed by the plaintiff in favour of Thakorbhai Gopalji contained a specific stipulation in it that the power of attorney holder should not transfer the lands in question?
- [iv] Does the plaintiff prove that the title in the lands in dispute did not pass to the defendant under the two sale deeds dated 14.8.1973 and 27.11.1973 on the ground that they were executed without consideration and were nominal, sham and bogus and not intended to be acted upon?
- [v] Does the defendant prove that the suit was not maintainable for want of a prayer for cancellation of the sale deeds under Section 31 of the Specific Relief Act, 1963?

##. On the above issues, it would be necessary that the parties be given an opportunity to lead further evidence. It is unfortunate that the matter has to go back after pendency of two decades. The learned counsel for both the sides attempted to bring about some amicable settlement between the parties having regard to their close relationship, but it appears that better counsel did not prevail amongst the parties. In absence of the appropriate issues having been framed we find that it would not be correct to render any decision on the existing state of evidence.

##. We, therefore, set aside the impugned judgment and decree of the trial Court and remand the matter with a direction to the trial Court to frame the aforesaid issues, over and above the issues already framed by it, and after giving the parties an opportunity of leading further evidence, take an appropriate decision in the matter afresh in accordance with law, expeditiously, preferably within three months from the date on which it receives the writ of this order. The appeal is accordingly allowed with no order as to costs. The Registry is directed to send back the R & P to the trial Court forthwith.

[R.K. ABICHANDANI, J.]

[K.M. MEHTA, J.]

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